IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	**:**	**CIVIL ACTION NO. 97-2847**
vs.	**:**	
JULIO SANTIAGO, a/k/a "DIRT" a/k/a "JULIO ACOSTA"	**:**	**CRIMINAL ACTION NO. 90-00431-02**

MEMORANDUM

DUBOIS, J.
JULY 10, 1997

This matter is before the Court on the pro se Motion of petitioner Julio Santiago to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255. Petitioner argues that he received ineffective assistance of counsel at his sentencing hearing. As explained below, his Motion pursuant to § 2255 will be denied.

I. Background

From early 1987 to late 1990, the Ramos Cocaine Organization ("RCO") distributed massive amounts of cocaine powder and crack cocaine on the 1700 block of Mount Vernon Street in Philadelphia, Pennsylvania. Presentence Report, June 24, 1991, amended December 3, 1992, ("Presentence Report") ¶¶ 20, 30-39. At its peak in the Summer of 1989, the RCO sold over $15,000 of cocaine and $20,000 of crack each day. Presentence Report, ¶ 29.

Petitioner was a key leader of the RCO from April 1989 until April 1990. See Sentencing, January 5, 1993, Tr. at 14; see

also Presentence Report, ¶¶ 43, 82; Change of Plea Hearing, March 19, 1991, Tr. at 27-29 (petitioner affirmed Government statement of his role in the RCO). He was responsible for both distribution of cocaine and crack and the collection of proceeds from sales. See Presentence Report, ¶ 43; Change of Plea Tr. at 27-29; see also Sentencing Tr. at 14. As a supervisor for the RCO, petitioner received substantial income from the RCO's sale of cocaine and crack. See Change of Plea Tr. at 27-29; see also Presentence Report, ¶ 82.

On March 19, 1991, petitioner pled guilty to Count III of the Indictment charging him with engaging in a continuing criminal enterprise in violation of 21 U.S.C. § 848(c). Change of Plea Tr. at 32. The underlying offense was the distribution of cocaine and cocaine base within 1,000 feet of a school in violation of 21 U.S.C. § 845(a). Sentencing Tr. at 12.

To be guilty of engaging in a continuing criminal enterprise, petitioner must have acted "in concert with five or more other persons with respect to whom [he] occupie[d] a ... supervisory position ...." 21 U.S.C. § 848(c)(2)(A). At the Change of Plea Hearing, petitioner conceded that he was a supervisor or manager of the RCO from April 1989 to April 1990. See Change of Plea Tr. at 27-29; see also Sentencing Tr. at 13-14 (Court finding that petitioner was a "key leader" of the RCO). According to the Presentence Report, the RCO distributed three kilograms of crack cocaine per week for a period of about twenty-six weeks (from April 1989 to October 1989), 1.5 kilograms of crack

cocaine per week for a period of about thirteen weeks (from October 1989 to January 1990), and one kilogram of crack cocaine per week for a period of about thirteen weeks (from January 1990 to April 1990). Presentence Report, ¶¶ 36-38. Based on petitioner's supervisory role in the RCO and the extent of the RCO's activities, the Court found that the amount of drugs attributable to the petitioner was "in excess of 15 kilograms of crack cocaine ...." See Sentencing Tr. at 14; see also id. at 13.

At petitioner's Sentencing on January 5, 1993, the Court determined that the base offense level for distribution of 15 kilograms or more of "cocaine base" was 42 under United States Sentencing Guidelines Manual ("U.S.S.G.") § 2D1.1(a)(3) (Nov. 1, 1992). Two levels were added to the base offense level pursuant to § 2D1.2(a)(1) because the distribution was within 1,000 feet of a school, increasing the offense level to 44. The Court also added four levels under § 2D1.5(a)(1) because the petitioner pled guilty to the crime of engaging in a continuing criminal enterprise. Thus, the adjusted offense level totalled 48. Petitioner was given a three level reduction for acceptance of responsibility under § 3E1.1(a)-(b), resulting in a total offense level of 45.

Petitioner had three criminal history points, placing him in Criminal History Category II. With a total offense level of 45 in Criminal History Category II, the Guidelines prescribed a sentence of life imprisonment.

The Government filed a Motion to Depart Downward under § 5K1 of the Guidelines and 18 U.S.C. § 3553(e). That motion was

granted. Petitioner was sentenced by this Court to a term of one hundred fifty-six (156) months imprisonment, followed by a five year term of supervised release.

Petitioner claims that his counsel at sentencing was constitutionally ineffective. His petition raises two issues. First, he argues that the Court applied an improper standard of "relevant conduct" and that his counsel was ineffective for not objecting. Second, petitioner maintains that his sentence was incorrectly determined pursuant to Guidelines applicable to "cocaine base" rather than the more lenient Guidelines applicable to "cocaine" and that his counsel was ineffective in failing to press that distinction.[1]

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1. The Court concludes that petitioner's § 2255 motion is not precluded by the one-year limitations period of the Antiterrorism and Effective Death Penalty Act of April 24, 1996 ("AEDPA"). The AEDPA provides that the limitations period applies to § 2255 motions and generally shall run from the date on which the judgment of conviction became final. See 28 U.S.C. § 2255 (6th unnumbered paragraph). However, there is a split in authority regarding the applicability of the AEDPA's limitations period to § 2255 motions which were filed after the effective date of the AEDPA and which relate to cases which became final more than one year before the AEDPA's enactment. Some courts have ruled that the AEDPA's limitations period applies to and bars such § 2255 motions. See, e.g., Clarke v. United States, 955 F. Supp. 593, 597 (E.D. Va. 1997). The greater weight of authority holds that courts should afford a reasonable period of time in which to file such § 2255 motions.

In this case, petitioner's motion was filed on April 23, 1997, more than one year after his judgment of conviction became final on January 5, 1997, but one day less than one year after the effective date of the AEDPA. Because the Court is concerned about the potential constitutional implications of barring such motions, and because those whose convictions become final after the effective date of the AEDPA are generally afforded one year to file a § 2255 motion, the Court concludes that, in a case such as this, a petitioner also should be afforded a reasonable time

(continued...)

II. Discussion

A. Test for ineffective assistance of counsel

Under Strickland v. Washington, 466 U.S. 668 (1984), a petitioner alleging ineffectiveness of counsel must make a twofold showing in order to demonstrate a violation of his Sixth Amendment right to counsel. First, a petitioner must establish that counsel's performance was so deficient that it fell below "an objective standard of reasonableness." See id. at 688. Second, a petitioner must demonstrate that counsel's "deficient performance prejudiced" petitioner; that is, that there is a reasonable probability that the result would have been different but for the deficient performance. See id. at 687.

Each of petitioner's claims is considered below.

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1. (...continued)
after the passage of the AEDPA to file a § 2255 motion; in this case, because petitioner filed his motion within one year after the AEDPA's enactment, the Court concludes that petitioner's motion was filed within a reasonable time and is therefore not barred. See United States v. Ortiz, No. 91-1250, 1997 WL 214934, *5 (E.D. Pa. Apr. 28, 1997) (holding that § 2255 motion filed ten months after the AEDPA became effective, but more than a year after the running of the limitations period, was filed within a reasonable time and thus was not barred (citing Brock v. North Dakota, 461 U.S. 273 (1983))); United States v. Rienzi, No. 96-4829, 1996 WL 605130, *1 (E.D. Pa. Oct. 21, 1996); see also United States v. Simmonds, 111 F.3d 737, 744-46 (10th Cir. 1997) (holding that a habeas petitioner should have a full year after the effective date of the AEDPA to file his petition); Lindh v. Murphy, 96 F.3d 856, 866 (7th Cir. 1996) (concluding same), rev'd on other grounds, No. 96-6298, 1997 WL 338568 (U.S. June 23, 1997). But see Peterson v. Demskie, 107 F.3d 92, 93 (2d Cir. 1997) ("[W]e see no need to accord a full year after the effective date of the AEDPA. At the same time, we do not think that the alternative of a 'reasonable time' should be applied with undue rigor."). Moreover, the Court notes that the Government did not argue that petitioner's § 2255 motion was time barred.

B. The Court properly determined "relevant conduct"

Petitioner asserts that the scope of "relevant conduct" under the Guidelines was narrowed between the March 19, 1991 Change of Plea Hearing and the January 5, 1993 Sentencing Hearing and that the Court should have, but did not, apply the more narrow definition. Petitioner also claims that his counsel was deficient for failing to argue that petitioner was prejudiced by the Court's allegedly incorrect interpretation of "relevant conduct" at sentencing.[2]

The Court notes that a sentence is generally determined with reference to the Guidelines "in effect on the date that the defendant is sentenced." U.S.S.G. § 1B1.11(a) (Nov. 1, 1992). That rule is applicable unless the Guidelines in effect at the date of the offense are more lenient than the Guidelines in effect at the time of sentencing. See U.S.S.G. § 1B1.11(a); United States v. Kopp, 951 F.2d 521, 526 (3d Cir. 1991). In this case, the Guidelines in effect at the time of the offense were not more lenient than those in effect at sentencing. Thus, the issue before

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2. The first claim in petitioner's § 2255 motion states specifically that:

> Between my plea and my sentencing, the concept of "relevant conduct" changed from that which was foreseeable to that which was jointly undertaken. My base offense level should have been calculated based on MY activities and not what I could foresee happening, and my lawyer should have taken appropriate steps to ensure that my guidelines sentence was properly calculated.

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the Court is whether the correct standard of "relevant conduct" was applied based on the 1992 Guidelines in effect at the January 5, 1993 Sentencing Hearing.

The 1992 Guidelines utilized by the Court at Sentencing define "relevant conduct" as "all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity ...." U.S.S.G. § 1B1.3(a)(1)(B) (Nov. 1, 1992). The 1990 Guidelines in effect at the March 19, 1991 Change of Plea Hearing state that "relevant conduct" encompasses acts and omissions "for which the defendant would be otherwise accountable," U.S.S.G. § 1B1.3(a)(1) (Nov. 1, 1990), including "conduct of others in furtherance of the execution of the jointly-undertaken criminal activity that was reasonably foreseeable by the defendant." Id., § 1B1.3 Application Note 1. The minor change in language in the provisions relating to "relevant conduct" in the 1990 and 1992 Guidelines is of no legal significance. Therefore, petitioner's argument, that the Court failed at the Sentencing Hearing to apply a standard of "relevant conduct" which had narrowed from the standard effective at the time of the Change of Plea Hearing, is apparently based on the case of United States v. Collado, 975 F.2d 985 (3d Cir. 1992), decided by the Third Circuit between the Change of Plea Hearing and Sentencing Hearing.[3] In Collado, the Third

3. In Collado, the Third Circuit addressed changes in the "relevant conduct" standard from the initial Guidelines of 1987 to the amended Guidelines of 1989. See Collado, 975 F.2d at 991, (comparing U.S.S.G. § 1B1.3(a)(1) & App. Note 1 (Nov. 1, 1987) with U.S.S.G. § 1B1.3 & App. Note 1 (Nov. 1, 1989)). Although (continued...)

Circuit directed courts to consider three factors in determining "relevant conduct." Specifically, the court in Collado explained that

> whether an individual defendant may be held accountable for amounts of drugs involved in reasonably foreseeable transactions conducted by co-conspirators depends upon the degree of the defendant's involvement in the conspiracy. ... [C]ourts must consider whether the amounts distributed by the defendant's co-conspirators [1] were distributed "in furtherance of the ... jointly-undertaken ... activity," [2] were "within the scope of the defendant's agreement," and [3] were "reasonably foreseeable in connection with the criminal activity the defendant agreed to undertake."

Collado, 975 F.2d at 995 (quoting U.S.S.G. § 1B1.3 App. Note 1).

The complete answer to petitioner's argument lies in the fact that the Court correctly applied the narrow standard of "relevant conduct" elucidated in Collado. At sentencing, the Court determined petitioner's "relevant conduct" by making its findings

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3. (...continued)
Collado does not discuss the application of the 1992 Guidelines, the Court notes that courts in the Third Circuit have applied the Collado standard when interpreting "relevant conduct" under post-1989 Guidelines. See, e.g., United States v. Brothers, 75 F.3d 845, 849 (3d Cir. 1996); United States v. Price, 13 F.3d 711, 732 (3d Cir. 1994), cert. denied, 115 S. Ct. 1372 (1995); United States v. Blount, 940 F. Supp. 720, 727-28 (E.D. Pa. 1996), aff'd without op. sub nom., United States v. Riddick, 100 F.3d 949 (3d Cir. 1996), cert. denied, 117 S. Ct. 751 (1997), and cert. denied, 117 S. Ct. 981 (1997); United States v. Reaves, 811 F. Supp. 1106, 1110 (E.D. Pa. 1993).

of fact with respect to each of the three factors delineated in Collado and found that:

> [T]he amount of drugs attributable to the Defendant, in excess of 15 kilograms of cocaine base, was **reasonably foreseeable** to the Defendant and was **within the scope of his agreement**, and was in **furtherance of his jointly undertaken criminal activity** as a **key leader of the [RCO]** ....

Sentencing Tr. at 13 (citing Presentence Report) (emphasis added).

The Court's sentence was based on its findings regarding petitioner's extensive involvement in the RCO. See Collado, 975 F.2d at 995 (requiring "searching and individualized inquiry into the circumstances surrounding each defendant's involvement in the conspiracy ...."). The Court found that petitioner was a key leader of the RCO from April 1989 until April 1990. See Sentencing Tr. at 13-14; see also Presentence Report, ¶ 43. During that time, he arranged and supervised purchases, sales, and distribution of cocaine and crack cocaine on Mount Vernon Street. See Sentencing Tr. at 14; see also Presentence Report, ¶ 43. In addition, he received substantial income from the activities of the RCO. See Change of Plea Tr. at 27-29; see also Presentence Report, ¶ 82. Petitioner even joined in attacks on those who challenged the RCO. See Sentencing Tr. at 13-14; see also Presentence Report, ¶ 43.

In sum, in determining petitioner's relevant conduct, the Court correctly applied the three prong test of Collado and made findings of fact to support the determination that petitioner was responsible for in excess of 15 kilograms of cocaine base. As a result, petitioner's counsel was not constitutionally ineffective

at sentencing for failing to object to the Court's "relevant conduct" analysis under § 1B1.3.

C. The Court applied the appropriate sentencing guideline with respect to crack cocaine

In his Plea Agreement, petitioner stipulated to having distributed over 15 kilograms of "cocaine base." He argues that the Guidelines prescribe a severe sentence for distribution of "crack cocaine," a form of "cocaine base," and that a less severe sentence for "cocaine" should have been applied in the absence of evidence that the substance he pled guilty to distributing was, in fact, "crack cocaine." He also contends that his counsel was constitutionally ineffective in failing to press the distinction.[4]

Petitioner's argument is apparently grounded in Amendment 487 to the Guidelines, a 1993 amendment which says that "'[c]ocaine base,' for the purposes of this guideline, means crack. 'Crack' is the street name for a form of cocaine base ...." U.S.S.G. Appendix C, Amend. 487 (Nov. 1, 1993) (codified as 3rd unnumbered paragraph to § 2d1.1(c) Drug Quantity Table). Under the amended language,

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4. The second claim in petitioner's § 2255 motion states specifically that:

> In my plea agreement I stipulated that the criminal organization distributed over 15 kilograms of "cocaine base." The more severe guidelines levels are limited to one form of cocaine base, "crack." My lawyer did not raise this distinction between cocaine and crack nor establish that I had more limited involvement with that substance than the organization.

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the Government must produce proof by a preponderance of the evidence that "crack cocaine" was the form of "cocaine base" before the enhanced sentence for "cocaine base" may be imposed. See United States v. James, 78 F.3d 851, 858 (3d Cir. 1996), cert. denied, 117 S. Ct. 128 (1996).

Petitioner's counsel was not deficient for failing to argue the distinction between "crack" and "cocaine base." First, such a distinction did not exist in the language of the statute at the time of sentencing--January 5, 1993. Compare U.S.S.G. § 2D1.1(c), at 86 (Nov. 1, 1992), with U.S.S.G. § 2D1.1(c), at 86 (Nov. 1, 1993). Amendment 487 did not take effect until November 1993, nearly ten months after sentencing.[5]

Further, Amendment 487 is not retroactive. Amendment 487 is not included in U.S.S.G. § 1B1.10(c), the provision which lists amendments covered by the policy statement on retroactivity of amended guidelines. The Third Circuit has held that amendments not listed in § 1B1.10(c) are not retroactive. See United States v. Thompson, 70 F.3d 279, 280 (3d Cir. 1995) (holding that amendment 459 is not specified in U.S.S.G. § 1B1.10(c) and therefore not retroactive). Because Amendment 487 is not listed in § 1B1.10(c), it is not retroactive and, thus, neither is the

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5. Nor was counsel ineffective for failing to anticipate the change in law effected by Amendment 487. "[I]n making litigation decisions, 'there is no general duty on the part of defense counsel to anticipate changes in the law.'" Sistrunk v. Vaughn, 96 F.3d 666, 670-71 (3d Cir. 1996) (quoting Government of the Virgin Islands v. Forte, 865 F.2d 59, 62 (3d Cir. 1989), cert. denied, 111 S. Ct. 2262 (1991)).

restricted definition of "cocaine base." See United States v. Kissick, 69 F.3d 1048, 1053 (10th Cir. 1995) (holding that Amendment 487 is not retroactive), cert. denied, 117 S. Ct. 1008 (1997).

Moreover, separate and apart from the applicability of Amendment 487, there was sufficient evidence in the record to conclude that the substance at issue was "crack cocaine," even under the James interpretation of Amendment 487. During the time petitioner was a key leader of the RCO from April 1989 to April 1990, the organization distributed from one to three kilograms of "crack cocaine" per week over a period of approximately 52 weeks. See Presentence Report, ¶¶ 36-38; see also Sentencing Tr. at 14. Because he was a "key leader" in the RCO, the Court found petitioner was responsible for RCO drug distribution "far in excess of 15 kilograms of crack cocaine ...." Sentencing Tr. at 14.[6]

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6. In addition, petitioner's Plea Agreement stipulation to RCO distribution of "15 kilograms or more of cocaine base" may be read in light of stipulations in the same paragraph of the Agreement that he "conspired to distribute **cocaine and crack** ... as an active member of an organization whose members distributed **cocaine and crack** in the vicinity of 17th and Mount Vernon Streets in Philadelphia." Plea Agreement, § 6(d)(1) (emphasis added).

The Court also notes, but does not rely upon, petitioner's testimony at the sentencing of Edwin Ramos, after Sentencing in this case, that reveals the extent of petitioner's involvement with "crack cocaine" in the RCO. See Sentencing of Edwin Ramos (Jan. 22, 1993) Tr. at 229 (admitting "overseeing the crack and cocaine and delivering the money" for "approximately two to three months ... [before being given] partnership to be in charge."); id. at 237-38 (answering "yes" when asked if he made twice a week purchases of three kilograms of cocaine and two kilograms of crack at the peak of RCO business).

In sum, because the Guidelines in effect at Sentencing did not make a distinction between "cocaine base" and "crack cocaine," and because there was sufficient evidence to conclude that the "cocaine base" at issue was in fact "crack cocaine" even had such a distinction been made, petitioner's counsel was not constitutionally ineffective for failing to argue that petitioner was sentenced improperly.

III. Conclusion

For the reasons set forth above, petitioner Julio Santiago's motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence will be denied.

An appropriate order follows.

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O R D E R

AND NOW, to wit, this 10th day of July, 1997, upon consideration of the Motion of Petitioner, Julio Santiago, under 28 U.S.C. § 2255 to Vacate, Set Aside or Correct Sentence (Document No. 22, filed April 23, 1997) and the Response in Opposition filed by the Government (Document No. 23, filed May 5, 1997), **IT IS ORDERED** that Petitioner's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside or Correct Sentence is **DENIED**.

IT IS FURTHER ORDERED that the Court finds no probable cause for appeal and therefore a certificate of appealability is not warranted. See 28 U.S.C. § 2253(c)(1).[7]

BY THE COURT:

JAN E. DUBOIS, J.

7. Section 2253(c)(1) provides as follows: "Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from ... the final order in a proceeding under section 2255." Id. The Third Circuit has concluded that "circuit justice or judge" includes district court judges and that "circuit" is not meant to modify both "justice" and "judge," and that district court judges therefore have authority to issue certificates of appealability. United States v. Eyer, 113 F.3d 470 & n.1 (3d Cir. 1997); see also Hunter v. United States, 101 F.3d 1565, 1573-83 (11th Cir. 1996).